Supreme Court, U.S.
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No. 91-1006

In The

Supreme Court of the United States

October Term, 1991

U.S. MARINE CORPORATION and
BAYLINER MARINE CORPORATION,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD and
INTERNATIONAL UNION, ALLIED INDUSTRIAL
WORKERS OF AMERICA, AFL-CIO,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

I. As Judge Easterbrook forcefully pointed out in his dissent on behalf of five of the eleven circuit judges, the court of appeals' decision requiring U.S. Marine to reinstitute the terms and conditions of employment that were in effect under Chrysler conflicts with decisions of several other circuits and is contrary to *NLRB v. Burns Int'l Security Services, Inc.*, 406 U.S. 272 (1972), and *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987). Pet. App. 53a-55a. Those decisions make it clear that "U.S. Marine was entitled to implement new terms when it took over, no matter how many of Chrysler's workers it expected to hire." *Id.* at 56a.

In an attempt to avoid the conflict among the circuits,[1] respondent National Labor Relations Board argues that this case does not call into question the rights of a successor employer under *Burns* and *Fall River Dyeing*, but instead concerns only "what *remedy* is appropriate when a successor has discriminatorily refused to hire employees in order to evade a bargaining obligation." NLRB Opp. at 12. In the Board's view, this case is unlike the contrary decisions of the Second Circuit and other courts of appeals because in those cases the employer "was not subject to a remedy for [a] violation of Section 8(a)(3) [discriminatory refusal to hire]." *Id.* at 15.

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[1] The Board suggests (Opp. at 10-11 n.13) that the judges of the court of appeals agreed *en banc* that there was no conflict among the circuits. But the document the Board cites is an order issued by one judge alone, Judge Ripple, the author of the majority opinion below. In light of Judge Easterbrook's dissenting opinion (see Pet. App. 54a, 56a), it is preposterous to suggest that the entire court agreed that no conflict exists.

a. The Board's attempt to avoid the conflict fails for two reasons. First, the complete remedy for U.S. Marine's allegedly discriminatory refusal to hire some of Chrysler's workers was the Board's order requiring U.S. Marine to hire those workers with full backpay.[2] The order requiring U.S. Marine to reinstitute Chrysler's terms – which applies to *all* employees, not merely to the 34 who were not hired – was the remedy imposed for U.S. Marine's refusal to recognize and bargain with the Union on behalf of all of the employees in violation of Section 8(a)(5).

The Board held that U.S. Marine refused to hire the 34 in order to avoid a bargaining obligation (Pet. App. 65a), and that had it hired those workers, it would have been obligated to consult with the Union before setting initial terms. Pet. App. 70a-71a. It therefore ordered U.S. Marine to reinstitute Chrysler's terms as a remedy for the company's failure to consult with the Union before setting those terms. *Id.* at 77a. But several courts of appeals have held that when a successor announces its intention to do so in advance, it is free to set its own initial terms even if it hires all of the predecessor's workers. See, *e.g.*, *Saks & Co. v. NLRB*, 634 F.2d 681, 687 (2d Cir. 1980); *International Association of Machinists v. NLRB*, 595 F.2d 664, 672-676 (D.C. Cir. 1978); *Nazareth Regional High School v. NLRB*, 549 F.2d 873, 880-882 (2d Cir. 1977); *NLRB v.*

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[2] Although we argue that the Board improperly shifted the burden of proof on the Section 8(a)(3) issue to U.S. Marine, we do not argue – and indeed *could* not argue – that reinstatement with backpay is not the appropriate remedy for a properly proven discriminatory refusal to hire. Pet. 27-30.

Spruce Up Corp., 529 F.2d 516 (4th Cir. 1975), enforcing 209 N.L.R.B. 194 (1974).

The failure of U.S. Marine to hire the 34 former Chrysler workers has nothing to do with the question of whether it was entitled to set its own initial terms. The Board's effort to characterize its order as justified by U.S. Marine's allegedly discriminatory hiring practices ignores the fact that in other circuits the company would have been allowed to set its own terms whether or not it had hired all of the predecessor's workers.

The Board does not dispute the critical fact that U.S. Marine told the former Chrysler workers in advance that it intended to set its own initial terms. Pet. App. 5a & 42a n.26. In fact, U.S. Marine set those terms before the initial group of employees began work on January 23, 1984, two days before the Union requested recognition on January 25 (the day on which the obligation to bargain with the Union began). *Id.* at 6a, 8a, 65a. As Judge Easterbrook emphasized, other courts of appeals faced with virtually identical circumstances have held that the successor employer was entitled to set its own initial terms, even though it was perfectly clear that it intended to hire substantially all of the predecessor's workers. *Id.* at 54a, 56a.

b. The second flaw in the Board's explanation remains even if we assume that the order requiring U.S. Marine to reinstitute Chrysler's terms was somehow a remedy for the company's refusal to hire the 34 workers as well as its refusal to bargain with the Union. Once again as Judge Easterbrook pointed out, the fit between the remedy and the violation is so imprecise as to make it

clear that the remedy is improperly punitive. Pet. App. 57a-60a. "Step one in resolving the question whether the Board's order is a remedy [rather than a punishment] is determining what would have happened if U.S. Marine had respected its obligations under the law." *Id.* at 52a. It is beyond dispute that had U.S. Marine recognized and commenced bargaining with the Union when it was asked to do so, and had it hired the remaining 34 former Chrysler workers, it still would have been able to set its own initial terms, just as it did. *Spruce Up Corp.*, 209 N.L.R.B. 194 (1975), enforced 529 F.2d 516 (4th Cir. 1975). It makes absolutely no sense to argue that the Board's order constitutes a proper "remedy" for U.S. Marine's refusal to bargain and its refusal to hire all of Chrysler's workers when it is clear that had U.S. Marine not violated the Act in those respects it still would have been entitled to set its own terms.

The court of appeals' reasoning, now repeated by the Board (Opp. at 13), that the remedy was appropriate because U.S. Marine "has made it impossible to determine precisely what terms and conditions would have been established had the employer bargained with the union" was effectively refuted by Judge Easterbrook. Pet. App. 55a-56a. It was *not* impossible (or even difficult) to determine what terms would have been set had U.S. Marine recognized the Union when asked to do so on January 25. By that time it had *already set* the initial terms of employment – as it had every right to do – and it stuck by those terms even after it commenced bargaining with the Union a few months later, on May 10, 1984. The Board's current speculation that U.S. Marine might have adopted Chrysler's terms if it had begun to bargain on

January 25 is not only completely far-fetched, it is also directly contrary to the record evidence. *Id.* at 59a.

Moreover, as Judge Easterbrook observed (Pet. App. 59a), the Board's decision was not based on a finding that U.S. Marine might have adopted Chrysler's terms had it agreed to bargain on January 25, or even on a finding that U.S. Marine's conduct made it impossible to determine the terms the parties would have agreed upon had bargaining begun at the appropriate time. See *Id.* at 69a-74a. The Board's rationale (*id.* at 71a) was that had U.S. Marine not discriminated against the 34 former Chrysler workers, it "would have retained substantially all the predecessor's employees" and therefore would not have been "entitled to set initial terms of employment without first consulting with the Union." As we demonstrate above and in our petition (20-24), that rationale conflicts with decisions of several courts of appeals, and the Board cannot use that rationale at this point to support the decision it originally reached based on a different theory. *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

In the final analysis, it is simply impossible to reconcile this case with *Saks*, *Nazareth*, *Spruce Up*, and *Machinists*. Just as in those cases, U.S. Marine clearly announced in advance that it intended to set its own initial terms and conditions of employment. Under *Burns* and *Spruce Up*, U.S. Marine had the right to set its own terms even if it was "perfectly clear" that it intended to hire substantially all of the predecessor's employees. "If, as four other courts of appeals hold, U.S. Marine was entitled to implement new terms when it took over, no matter how many of Chrysler's workers it expected to

hire, then these terms establish the benchmark that the Board is entitled to restore." Pet. App. 56a.

c. Perhaps recognizing the weakness of its argument on the merits, the Board asserts (Opp. at 17-18) that "review is not warranted because petitioners' remedial claim is jurisdictionally barred." We fail to understand how the Board can *defend* the court of appeals' decision by arguing that the court did not have jurisdiction to render it. Moreover, the court below decided both the jurisdictional issue and the *Burns/Spruce Up* issue, and the court's opinion will stand (and the conflict will continue) unless the decision is reviewed by this Court. If the Board seriously questions the court of appeals' jurisdiction, it should urge the Court to grant the petition and resolve the jurisdictional question.

In any event, the Board's jurisdictional argument was correctly and unanimously rejected by the court of appeals. See Pet. App. 30a n.17. After the Administrative Law Judge declined to order U.S. Marine to reinstitute Chrysler's terms, both the Board's General Counsel and the Union filed specific exceptions raising that issue. General Counsel's Exceptions at 2; Charging Party's Exceptions at 3. In its brief, the General Counsel argued that although "a successor is ordinarily free to set initial terms of employment," U.S. Marine was not in this case because of its "illegal hiring practices." General Counsel's Brief in Support of Exceptions at 21. The Union also extensively discussed the issue in its brief and argued that U.S. Marine sought "to circumvent [the *Burns*] principles and [to] utilize[ ] the Board's *Spruce Up* rationale in a manner so as to aid it in its unlawful overall

scheme * * * ." Charging Party's Brief in Support of Exceptions at 35.

In addition, the Board considered and discussed the issue at length in its decision. Pet. App. 69a-74a. Under the circumstances, the Board's argument that U.S. Marine was required as a jurisdictional matter to file a pointless motion for reconsideration is peculiar indeed.[3] The issue was raised by the exceptions filed by the General Counsel and the Union, was fully briefed, and was considered and decided by the Board.

Section 10(e) prohibits the courts of appeals from considering issues that were not presented to the Board; it cannot be read to require that the party seeking review of an issue be the same party who raised the issue before the Board. "Once an issue is raised before the NLRB, another party may litigate the issue on appeal." *Local 512, Warehouse & Office Workers' Union v. NLRB*, 795 F.2d 705,

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[3] The Board's rules provide that it will entertain a motion for reconsideration only under "extraordinary circumstances" (29 C.F.R. § 102.48(d)), and the Board has repeatedly held that it will not entertain motions for reconsideration that "raise[ ] no substantial issues that were not considered by the Board in its original Decision and Order." *Kahn's & Co.*, 256 N.L.R.B. 930 (1981). See also *International Alliance of Theatrical Stage Employees, Local 249*, 265 N.L.R.B. 637 (1982); *Kraft Foods, Inc.*, 254 N.L.R.B. 803 (1981); *International Union of Operating Engineers, Local 675*, 197 N.L.R.B. 244, enforced 82 L.R.R.M. (BNA) 2687 (D.C. Cir. 1972). Since the Board did consider and decide the issue of whether U.S. Marine should be required to reinstate Chrysler's terms in its original decision, it makes no sense to argue that U.S. Marine was required to file a motion for reconsideration that the Board by its own admission would not have entertained.

714 (9th Cir. 1986). See also *NLRB v. United States Postal Service*, 833 F.2d 1195, 1202 (6th Cir. 1987); *Consolidated Freightways v. NLRB*, 669 F.2d 790, 794-795 (D.C. Cir. 1981); *Mourning v. NLRB*, 559 F.2d 768, 771 & n.5 (D.C. Cir. 1977). *Accord Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (holding that an issue on which an *employer* sought review was not preserved because it "was not raised during the proceedings before the Board, *either by the General Counsel* or by [the employer]") (emphasis added).[4]

II. As we demonstrate in the petition (27-30), the Board and the court of appeals required U.S. Marine to hire the 34 former Chrysler workers even though there was "no real, substantive, evidence that [U.S. Marine's] refusal to hire the 34 was based upon their union membership or upon their former employment with Chrysler" (Pet. App. 127a-128a) and there was "no substantive evidence of why one person was hired and one was not hired." *Id.* at 68a. The Board rested its decision in large part on the failure of U.S. Marine to supply "a convincing rationale" and to demonstrate "legitimate reasons" for its hiring decisions. *Id.* at 67a, 68a.

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[4] It is beyond dispute that if the Board had adopted the ALJ's decision and had refused to order U.S. Marine to reinstitute Chrysler's terms and conditions, the Union could have sought review in the court of appeals without filing a motion for reconsideration. To accept the Board's jurisdictional argument, the Court would have to conclude that the court of appeals had jurisdiction to consider an appeal by the Union, but not to consider an appeal on the very same issue by the employer. That result would make no sense and is not supported by either the language or the purpose of Section 10(e).

The Board and the court of appeals thus misapplied this Court's decision in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), and improperly placed the burden on U.S. Marine at the *prima facie* case stage to prove that it had not acted unlawfully. The Board does not dispute (Opp. at 20-21) that the court of appeals' decision conflicts with the Second Circuit's initial decision in *Holo-Krome Co. v. NLRB*, 947 F.2d 588, 592 (2d Cir. 1991), but argues that the Second Circuit's supplementary opinion resolves that conflict. But the Second Circuit's "slight refinement" (slip op. 2) of its original decision does not go so far as the Board suggests. The court of appeals held merely that the Board may consider any explanations offered by the employer in deciding whether the General Counsel has presented a *prima facie* case. Slip op. 10. The court of appeals did *not* hold that the Board can require the employer to provide a "convincing rationale" for its conduct, and can decide that a *prima facie* case has been presented because the employer failed to convince the Board that there were "legitimate reasons" for its decision.[5]

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[5] The Union's suggestion (Union Opp. at 21) that this case is moot because the Hartford plant has been closed is entirely without merit. Petitioners continue in business and would be liable for massive amounts of backpay should the court of appeals' decision that U.S. Marine unlawfully refused to hire the 34 former Chrysler workers be allowed to stand. In addition, U.S. Marine employees (as well as the 34 former Chrysler workers) no doubt will claim to be entitled to additional retroactive pay and benefits should the Board's order requiring U.S. Marine to reinstitute Chrysler's terms of employment be enforced. The Board, quite properly, does not suggest that this case is moot.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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